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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–44a) is not yet reported. The ruling of the Federal Communications Commission, released on October 8, 1965 (J.A. 13–16),[1] is unreported. The Commission's ruling on reconsideration is reported at 1 F.C.C. 2d 1587.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1967, and the petition for a writ of cer-

[1] "J.A." refers to the printed joint appendix filed in the court of appeals.

tiorari was filed on September 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

The Fairness Doctrine of the Federal Communications Commission requires that broadcast licensees present responsible spokesmen for both sides of controversial issues of public importance discussed on their stations. It further requires that where an attack is made upon the character or other personal qualities of an individual during discussion of a controversial issue, time must be afforded to that person to reply. The basic question presented is whether the Fairness Doctrine, as applied by the Commission to personal attacks, is consistent with the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Constitution and of Sections 315 and 326 of the Communications Act of 1934, 48 Stat. 1088, 1091, as amended, 47 U.S.C. 315, 326, are printed in the petition (pp. 3–5).

STATEMENT

This case arises out of the application of the "Fairness Doctrine" of the Federal Communications Commission to a request for time by Fred J. Cook to answer a personal attack against him carried by radio station WGCB, Red Lion, Pennsylvania.

1. The major elements of the Fairness Doctrine, as it relates to this case, were enunciated in 1949. *Report of the Commission in the Matter of Editorializing by*

Broadcast Licensees, 13 F.C.C. 1246.[2] There the Commission, after public hearings, declared that while licensees might advance their own views in broadcast editorials their mandate to maintain "radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole" (13 F.C.C. at 1248) required them to make their facilities "available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise" (13 F.C.C. at 1250). The Commission explained (13 F.C.C. at 1251):

> We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approxima-

[2] Previous Commission decisions had established the basic policy that licensees could not limit the presentation of views to those with which they agreed. See, *e.g.*, *Young People's Association for the Propagation of the Gospel*, 6 F.C.C. 178.

tion of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

The Fairness Doctrine was given formal statutory basis in 1959, when Congress, in amending Section 315 of the Communications Act (47 U.S.C. 315) to exempt certain programs from the requirements of that section for affording equal time to opposing candidates for political office, added the following caveat (73 Stat. 557):

> Nothing in the foregoing * * * shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[3]

Under the Fairness Doctrine, the Commission dealt with fairness problems on an *ad hoc* basis, except that it did give general expression to the requirements of the doctrine in cases where a personal attack occurs in connection with a discussion of a controversial issue. Public Notice of July 25, 1963 (25 Pike & Fischer R. R. 1899). And, on July 1, 1964, the Com-

[3] H. Rep. No. 1069, 86th Cong., 1st Sess., explains (p. 5): "[this] is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." See, also, S. Rep. No. 562, 86th Cong., 1st Sess., pp. 8–9, 13.

mission issued a Fairness Primer containing digests of past individual rulings on fairness complaints, 29 F.R. 10415, including a section devoted to the personal-attack aspect of fairness.

This is the general background of the WGCB matter.

2. On February 7, 1965, Cook filed a complaint with the Commission (J.A. 2–5) alleging that WGCB had broadcast a personal attack against him in the syndicated program of the Reverend Billy James Hargis, containing the following statements (J.A. 36):

> Now, this paperback book by Fred J. Cook is entitled, "GOLDWATER—EXTREMIST ON THE RIGHT." Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies * * *. Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing * * * there was a 208 page at-

> tack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency * * * now this is the man who wrote the book to smear and destroy Barry Goldwater called "Barry Goldwater—Extremist Of The Right"!

Cook alleged that he had not been notified of the broadcast by the station and that the station was insisting upon payment as a condition of permitting him to use its facilities to reply. The Commission brought the complaint to the attention of WGCB (J.A. 7). The station responded that it would give Cook free time only if he was unable to pay the regular charge (J.A. 8–9).

By letter of October 6, 1965 (J.A. 13–16), the Commission advised station WGCB that under the Fairness Doctrine the station had a duty to make time available without a showing or representation by Cook that he was financially unable to sponsor or pay for the reply time. The Commission reminded the station that it had a responsibility, where a personal attack was carried on its facilities, to "inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond" (J.A. 15). The Commission further stated (J.A. 15):

> In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.*, FCC 63–849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether

> the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. CF. *Cullman Broadcasting Co., supra.*

Petitioners' request for reconsideration (J.A. 16–19) was denied on December 9, 1965 (J.A. 20–25), by a letter in which the Commission further explained its views as follows (J.A. 22):

> As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take

other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63–849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

On petition for review by Red Lion, the court of appeals, in an opinion by Judge Tamm, with Judge Miller not participating, and Judge Fahy concurring, affirmed the Commission's order.[4] Judge Tamm re-

[4] Previously, the panel had dismissed the petition on the ground that the Commission's declaratory ruling was not reviewable. Judge Fahy dissented. On petition for rehearing *en banc* by the government and Red Lion, the court of appeals vacated the judgment of dismissal and directed that the case be considered on the merits (Pet. App. 2a).

viewed the background of the Fairness Doctrine and carefully canvassed the issues. He held that the statute contained a permissible and adequately precise delegation of power to the Commission (Pet. App. 24a–29a), that the Fairness Doctrine was not unconstitutionally vague (Pet. App. 34a–38a), and that there was no denial of the right of free speech (Pet. App. 38a–43a). Judge Fahy concurred in the result reached by Judge Tamm and in general with his reasoning, without, however, joining in all of the details of the opinion.

ARGUMENT

1. Petitioners ask this Court to decide whether the Federal Communications Commission's "Fairness Doctrine"—specifically that aspect of it which entitles the victim of a personal attack to free time in which to reply on the station that carried the attack—is consistent with the First Amendment's guarantee of free speech. Although the issue is fundamental and of practical importance to the day-to-day operation of the broadcasting industry, we urge that certiorari be denied, since there is no conflict among the circuits and the decision below is in our view correct.

2. This Court has affirmed that while the "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the mode of expression, the special conditions of the medium may affect the "permissible scope of community control" (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502–503). This precept applies with special force to broadcasting. Since the radio spectrum is lim-

ited, government may and must regulate access to it, awarding licenses and regulating licensees so as to promote "the larger and more effective use of radio." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 215–216, 226. One important aspect of this duty is to assure that the airwaves do not become monopolized by one point of view; that the relative handful of licensees which is all the spectrum can accommodate accords a fair hearing to competing positions on significant issues. See *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994, 1009 (C.A.D.C.).

That is the essence of the Fairness Doctrine. It is wholly consistent with the First Amendment, which this Court has declared "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States,* 326 U.S. 1, 20. The refusal of a licensee to present both sides of an issue of public importance cannot be squared with this premise. The Fairness Doctrine contains no restriction upon the licensee's judgment in presenting any program or any view on any subject. The requirement of presenting other views does no more than preserve the public's right to be informed. In so doing, it promotes, not retards, the goals of free speech.

The requirement should not be diluted by conditioning the right of free reply on a showing of inability to pay the station's rates—a rule that would have unfortunate consequences, as the Commission explained (see Statement, *supra,* pp. 7–8). While it is perhaps

arguable that requiring a station to afford free time for replies to personal attacks may have some tendency to deter the station from treating controversial subjects, it has not been the Commission's experience that this is a substantial danger, and it seems clearly outweighed by the far greater dangers to freedom entailed by any rule which would permit stations to use their monopoly of the radio spectrum to suppress views opposed to those they have broadcast.

3. The briefs *amicus curiae* urge that the Court defer disposition of the instant petition pending decision by the Seventh Circuit of several cases which challenge recently promulgated rules of the Commission codifying the Fairness Doctrine in the personal-attack area.[5] We do not agree. If the Court concludes

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[5] In the summer of 1967 the Commission codified the general principles of the Fairness Doctrine as applied to personal attacks and political editorials. The rules require that when a personal attack is made on a person or group during a presentation of views on a controversial issue of public importance, the licensee must notify the party attacked, furnish a transcript, tape or summary and offer the party attacked a reasonable opportunity to respond over the licensee's facilities. The rules do not apply to attacks on foreign parties, to attacks by legally qualified candidates (political campaigns are governed by 47 U.S.C. 315) or to non-editorial bona fide news casts and spot coverage of bona fide news events. *Memorandum Opinion and Orders*, F.C.C. Dkt. No. 16574, adopted July 5, 1967, modified August 2, 1967. Although the rules do not expressly provide for free time, the Commission's Fairness Doctrine would require that it be made available in circumstances parallel to the instant case. The rules are being challenged as unconstitutional in the Court of Appeals for the Seventh Circuit. *Radio & Television News Directors Assn., et al.* v. *United States and Federal Communications Commission*, C.A. 7, No. 16369; *Columbia Broadcasting System, Inc.* v. *United States and Fed-*

—contrary to our submission—that it should review the Fairness Doctrine at the earliest suitable occasion, we submit that the present case affords a more appropriate vehicle than the Seventh Circuit cases, and that to postpone decision in order to await the ruling of the Seventh Circuit would only engender confusion and uncertainty. The present case involves a concrete and focused application of the Fairness Doctrine; while the Seventh Circuit cases present a sweeping attack on necessarily general rules, unilluminated by specific facts. Under normal criteria governing review on certiorari, the concrete controversy is to be preferred. However, we reiterate our view that the Court should decline review of the present case, in light of the soundness of the Fairness Doctrine and the absence, as yet, of any conflict among the court of appeals on the point.

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eral Communications Commission, C.A. 7, No. 16498; and *National Broadcasting Company, Inc.* v. *United States and Federal Communications Commission*, C.A. 7, No. 16499.

In addition, the Fairness Doctrine is being challenged by broadcast interests in review proceedings attacking a Commission decision under the Fairness Doctrine (Memorandum Opinion and Order, F.C.C. Dkt. RM–1170, adopted September 8, 1967) that licensees who carry cigarette advertising must grant broadcast time to parties who believe that cigarette smoking is dangerous. *WTRF–TV, Inc. and Natl. Assn. of Broadcasters* v. *Federal Communications Commmission and United States*, C.A. 4, No. 11,734; *WTRF–TV, Inc. and Natl. Assn. of Broadcasters* v. *Federal Communications Commission and United States*, C.A. 4, No. 11,736; *Sis Radio, Inc.* v. *Federal Communications Commission and United States*, C.A. 4, No. 11,767. An opponent of smoking is also attacking the Commission's failure in Dkt. RM–1170 to require that broadcasters grant time substantially equal to the time used for cigarette advertising. *Banzhaf* v. *Federal Communications Commission and United States*, C.A.D.C., No. 21,285.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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